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Fourth and Fifth Amendment Decisions: Students and Constitutional Rights

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For several years, the authors of this paper have studied how the First Amendment was applied to situations involving students in secondary schools. And, for years, there has always been something new and exciting to discuss. An event earlier last year (2013), however, has caused us to broaden our horizons a bit. There are, after all, more amendments in the Bill of Rights than just the First. Our discussion will focus primarily on the 4th and 5th amendments, though by default, we will touch upon the 14th amendment, as well.

In February, 2013, Wes Little, the father of a fourth-grader at West Sabine Elementary School in Pineland, Texas, filed a law suit against the school district for allegedly conducting a search of students in violation of the Fourth Amendment (prohibiting unlawful searchers) and in violation of students' privacy rights. According to the lawsuit, employees of the school found fecal matter on the floor of the gymnasium several times. School officials had no evidence to indicate who was responsible. To try to determine who was responsible, the principal, Deborah Lane, separated the fourth-grade students into gender groups. Each group then was directed to lower their pants and underwear below the hips and to be inspected by the school nurse for feces on their person. According to court papers, the inspection by the administration did not shed any light on who was responsible for the original offense. Further, prior to the inspection, no parents were contacted and informed as to what was to happen. Are students as early as the fourth grade protected by the Fourth Amendment search and seizure provision?

The Fourth Amendment to the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon Probable Cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The U.S. Supreme Court has recognized the difference between 4th Amendment search and seizure issue regarding adults and students. Most often it will support a school's search and seizure policies because of the unique nature of schooling. But, so oft quoted in *Tinker*, "students possess the same constitutional rights as adults and that these rights do not end at the school house door (*Tinker*).” In *New Jersey v. T.L.O* (1985) the court addressed the issue of whether a search by a school official is a “search” at all for Fourth Amendment purposes. It also considered whether the standard of probable cause should be modified to reflect the “special circumstances of public education.” Probable cause implies a higher standard since it relates a criminal offense. The Supreme Court instead used “reasonable suspicion” which afforded school administrators greater latitude in conducting searches. “The Supreme Court, in upholding the school administrator, did not require that the search be based on the higher standard of ‘probable cause’ necessary for obtaining a search warrant, reasoning to do so ‘would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools.’ Thus, the court struck a balance between the pupil’s ‘legitimate expectations of privacy’ and the need of a school

to preserve a proper learning environment. (Essex, p.65)” Yet, in a 2009 decision, *Safford v. Redding*, the Court concluded that the Arizona school officials went too far in strip searching a 13-year-old student who they believed might have provided ibuprofen to another student. The issue before us is, when do searches or drug tests of students in public schools violate their constitutional rights?

Do the same standards apply to students who wish to engage in extra-curricular activities? In a 1995 case, *Vernonia v. Acton*, the court considered the constitutionality of across-the-board searches not based on individual suspicion. Do school administrators have the right to require all students to submit to a urine test in order to play football, or for that matter any extra-curricular activity? In a 6-3 decision, the Supreme Court supported the Verononia School District’s drug policy. “The reasonableness of a search is judged by ‘balancing the intrusion on the individual’s Fourth Amendment interests against the promotion of legitimate governmental interests.’ School athletes who are under state supervision during school hours are subject to greater control than over free adults. We find it interesting that in a 1997 case, *Chandler v. Miller*, the court in an 8-1 decision ruled that Georgia’s policy of drug testing candidates for state offices violated the Fourth Amendment. In 2002, the parents of Lindsey Earl filed suit against Tecumseh, Oklahoma’s drug policy that required all students participating in extra—curricular activities submit to drug testing. The 10th Circuit Court of Appeals ruled that the policy was unreasonable. The U.S. Supreme Court, however, in a 5-4 decision reversed the 10th Circuit and upheld the school’s drug testing policy. (*Board of Education v. Earls*, 2002)

Search and seizure cases do not only pertain only to searches and drug testing but also to cellphone use as well. “A number of states have currently formulated policies prohibiting the use of cell phones and pagers in public schools and stated expected consequences for policy violators and exceptions granted for special use. School officials, however, appear to be moving toward relaxing policies that prohibit cell phone use (Essex, p.75)” The reasons for cell phone prohibition are legion. The National School Safety and Security Services, a Cleveland, Ohio based security firm cites the following reasons:

1. Cell phones have been used to call a bomb threats.
2. Students can potentially detonate a bomb if one is on campus.
3. Cell phone use can hamper, disrupt, and delay public safety personnel response.
4. Cell phones can impede public service response by accelerating parental and community arrival at the scene of an emergency during a time when officials may be attempting to evacuate students to another site.
5. Cell phone use typically overload during a real crisis as happened in the Columbine tragedy and the World trade Center attacks. (Essex, 76)

In addition to security threats cell phone use has been use for cheating on exams and taking photos of students in restrooms and disrobing in locker rooms, all prohibited by school policies. The courts have generally supported these policies based on the “disruption” standard and maintaining a safe environment to facilitate teaching and learning.

There are a growing number of school districts that are abandoning cell phone prohibition as educational uses of technology become more apparent. Text messages can serve as homework reminders and students can access the internet for information and email teachers for clarification of assignments. To date, a Fourth Amendment search and seizure case has not come before the U.S. Supreme Court that involves a school policy. However, state supreme cases in California (*People v. Diaz*) and Florida (*Smallwood v. Florida*) have been decided that involve Fourth Amendment searches that involve cell phones. And, two additional cases, *Riley v. California* and *United States v. Wurie* have reached the U.S. Supreme Court. Combined, these cases involve a Fourth Amendment challenge which will have implications for education.

In the California case *People v. Diaz*, 51 Cal. 4th 84, 244 P.3d 501, 119 Cal. Rptr. 3d 105 (Cal. January 3, 2011). The Court held that police are not required to obtain a warrant to search

information contained within a cell phone in a lawful arrest. On February 29, 2012 in *United States v. Flores-Lopez*, the 7th Circuit Court of Appeals upheld the warrantless search of a cell phone upon arrest with reasoning similar to *People v. Diaz*. These two cases were in some part determined by precedent. In three earlier cases, *United States v. Robinson*, *United States v. Edwards*, and *United States v. Chadwick* held that any object associated with a lawful arrest was subject to search. But this raises some thorny issues. The three cases cited were determined prior to cell phone technology. In fact in *Robinson*, the unwarranted seizure of a cigarette carton on Robinson's body was valid. In the *Diaz* case Justice Werdegard in dissent argued that "containers" mentioned in the previous cases were not analogous to the cell phone. "which could potentially contain wealth of private electronic data (Minkevitch, p.1)."

On May 2, 2013, the Florida Supreme Court, in a 5-2 ruling, stated the police needed a search warrant to access the data stored on an arrested person's cellphone. The case involved Cedric Smallwood who was involved in a 2008 convenience store robbery in Jacksonville, Florida. "Writing for the majority, Chief Justice Fred Lewis said that in Smallwood's case, "a warrant was required before the information, data, and content of the cellphone could be accessed and search by law enforcement (*Smallwood v. State*)."

While the above cases all deal with search and seizure activities, another question arises as to how much protection a person has when making statements about their activities. Usually, when a student is being accused of inappropriate behavior, the first question is "did you do this" or "why did you do this?" Is the student allowed to not answer the question, if they feel doing so would expose them to disciplinary action? And, what if the answer to those questions not only exposed them to school disciplinary action, but also to possible criminal liability?

The Fifth Amendment to the Constitution reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Before examining this Amendment to see how it might apply to high school students, some unpacking should be done. Like several of the other Amendments, this one covers quite a bit of the landscape. First, it establishes that no one (with the exception of military personnel) can be tried for a serious crime unless they have been indicted by a grand jury. It also establishes the concept of double jeopardy (not being tried twice for the same offense). It also is the first mention of the concept of Due Process (which is also a part of section 1 of the Fourteenth Amendment), or the right of an individual to be notified of charges against them, the right to contest these charges, and the right to appeal. The Fifth Amendment also requires that, in cases of eminent domain, just compensation is given for the taking of property.

When looking at the Fifth Amendment as it is related to high school students, however, the clause that is most pertinent is the phrase stating that no person "shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law". It is from this clause that the idiom of "taking the Fifth" arose. The well-known "Miranda Rights," (*Miranda v. Arizona*, 1966) which were the result of a 1966 Supreme Court decision stating that criminal suspects must be informed of their rights against self-incrimination before they were arrested, are perhaps the best-known rights in American culture.

The question of the right to not incriminate oneself in some cases is very straight-forward. If the suspected crime is a felony and if conviction for this crime could result in a possibility of incarceration, the Fifth Amendment automatically applies. If the case would result in a civil, rather than criminal, action, the Fifth Amendment, which can still be invoked, does not carry the

same weight. Where, in criminal cases invoking the right to not testify against yourself is not supposed to create a “presumption of guilt,” the Supreme Court, in *Baxter v. Palmigiano*, ruled that refusal to answer a question in a civil case does not forbid an “adverse inference” on the part of the jury.

While most of the appropriate clauses in the Fifth Amendment would be applied in a criminal case involving a high school student, by default, there are several issues related to the right against self-incrimination and due process that create a legal conundrum for both school officials and students. For example, the Fifth Amendment specifically states that no person “shall be compelled in any criminal case to be a witness against himself.” Very few school disciplinary procedures rise to the level of “criminal case” and, even if one should rise to this level, the court proceeding would seem to be the place where the Fifth Amendment protection would come into play. There is no question as to whether the student could be forced to testify against himself, as the Fifth Amendment protections clearly apply in a court setting. However, a school official who interviewed the student and demanded that the student respond to the questions could be called to testify, thus allowing the student’s own words to be used against him.

Furthermore, over the years, the reach of the Fifth Amendment has been broadened by courts to include statements or testimony given in legislative hearings, public policy hearings, or before any other governmental agency. A major unanswered question relates to whether School Boards, or the administrators who are employed by these boards, are exempt from the requirements of the Fifth Amendment. Goodwin (1987) suggested using a three-prong analysis of the facts of any specific case, based on a 1985 Supreme Court case, *New Jersey v. T.L.O.* While this case was specifically targeted at questions related to the application of Fourteenth Amendment questions to public school, Goodwin suggests that the same reasoning can be applied to questions related to the Fifth Amendment, particularly those related to due process. This ruling provided a three step analysis in determining whether any part of the Constitution applied to schools. First, a determination must be made that the particular amendment applies to public school officials. Next, the substance of the amendment involved must be examined to determine whether the school activity being considered is “within the scope of the amendment” involved. Finally, a determination must be made whether the “special relationship” between school officials and students makes application of the amendment inapplicable in the context of a school setting. (Goodwin, 1987)

It is well accepted that a violation of school rules or policies is not always a criminal act. For example, a student caught smoking in a non-smoking area of the school grounds has clearly violated a school rule, but there would be no criminal action. However, there are also times when violating a school rule also would be a criminal violation (e.g., assault on another student or teacher; or, bringing illegal drugs to the campus). Although case law does not address this specifically, a general rule would be that the Fifth Amendment would not apply when only school policies are involved, but would apply if possible criminal jeopardy was involved. (Goodwin, 1987).

To further confuse the issue, courts have not been consistent in their rulings regarding Fifth-Amendment rights for students. While several courts have ruled in favor of school districts claiming that the “special relationship” between schools and students outweighs the Fifth Amendment rights, other courts have held that the Fifth Amendment protections are paramount. Often times, the rulings against the protections are based on ancillary questions, such as whether a student being held in a principal’s office is “in custody” at the time of the questioning. In *J.D.B. v North Carolina*, for example, the U.S. Supreme Court refused to apply Fifth Amendment protections to a student who had been interrogated inside a school. The Court remanded the case back to the state court for a hearing to determine if the student was in custody at the time of his interrogation, even though the people interrogating the student at the school included police officers and school officials. This question is further complicated by the fact that many “school resource officers” are also sworn law-enforcement officers who are either working for the school

district or who are assigned to the school from a local law enforcement agency. When a student confesses to an act which might not only be a violation of school rules, but also a violation of criminal law in the presence of a police officer, or member of another law enforcement group, it seems strange that the Fifth Amendment rights of the student are somehow mitigated based on the location of the interrogation.

However, in another case in Kentucky (*N.C. v. Kentucky*, 2013), the Kentucky Supreme Court ruled that a student's confession to school officials and the School Resource Officer (who was a sworn sheriff's officer) should not have been allowed in a later criminal case against the student. In this particular case, the student had been taken to a room in the school office, where he had been questioned in a closed setting by an assistant principal. The School Resource Officer later testified that he had been present throughout the questioning and that he had been wearing clothing (not to mention a firearm) that clearly identified him as a law enforcement official. In this instance, the Kentucky Supreme Court considered two major factors: 1) whether a law enforcement officer is present and takes part in the questioning; and, 2) was the individual being questioned being held in custody. Given the circumstances of the "confession," the court held that the student had every reason to believe he was in custody and that he was being questioned by law enforcement officials.

Clearly, school disciplinary matters do not rise to the same level as criminal acts in most instances. However, when school disciplinary matters and criminal law overlap, there are typically three areas where the legal questions arise. First, where did the interrogation occur (was the student in custody)? Next, who participated in the interrogation? Finally, where was the crime committed and did this crime result in a direct threat to the school or to the students? (Lentini, 2012)

For the most part, courts have not equated "custody" with compulsory attendance, which means that, if the place of interrogation is on school premises, certain other factors had to be in place for a student to be considered "in custody." The guiding question here is whether the student would feel free to leave the questioning. If the student felt constrained to the location where the interrogation was being done, and did not feel they had the right to leave, custody is established. In *J.D.B. v. North Carolina* (2011), the Supreme Court noted that juveniles are more likely than adults to give in to pressure. (Lentini, 2012) Therefore, they would be more likely to provide a tainted confession than adults.

The questions related to the participants in the interrogation are somewhat murkier. In *S.E. v. Grant County Bd. of Education, et.al* (2008), the court hearing allegations of violations of the Fifth Amendment regarding a student who was referred to legal officials by a school official after being accused of giving a fellow student an Adderall pill, found that the school principal who conducted the interrogation was not a law enforcement agent and, therefore, was not subject to rules requiring a Miranda warning. (Batterson, n.d.) However, in the aforementioned *N.C. v. Kentucky*, the Kentucky Supreme Court held that, because the assistant principal who conducted the interrogation was acting in concert with the School Resource Officer, the assistant principal was, for all practical purposes, a "state actor." (Kentucky Supreme Court Rules, 2013)

The final question is concerned with where the crime was committed and whether or not the alleged crime posed a direct threat to the school or to the students at the school. While common sense clearly tells us that there are some conditions under which a student could be made to make incriminating statements (e.g., he is strongly suspected of being involved with a planned mass shooting), there are also many instances where the school clearly has no jurisdiction (e.g., a series of burglaries in homes near the school). On this question, though, the courts do not provide guidance. These issues have not been heard by courts and, thus, no guidance can be found.

An examination of court cases related to Fifth Amendment rights as applied to school students leads to the conclusion that there are more questions than answers currently available. And, where there are answers, they are often contradictory and provide little guidance. When lower courts disagree about application of a legal standard, the disagreements usually end up before the

U.S. Supreme Court, where guidelines and directions are provided. To this point, however, the U.S. Supreme Court has not ruled on any of issues raised in this paper.

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